

Decision 02-12-080 December 30, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish
Policies and Cost Recovery Mechanisms for
Generation Procurement and Renewable
Resource Development.

Rulemaking 01-10-024
(Filed October 25, 2001)

**INTERIM OPINION REGARDING EMERGENCY MOTION OF
SAN DIEGO GAS & ELECTRIC COMPANY**

I. Summary

In this decision, we grant, with modifications, the emergency motion filed by San Diego Gas & Electric Company (SDG&E) on December 23, 2002. SDG&E seeks suspension of Standard of Conduct #7, as adopted in Decision (D.) 02-10-062 and clarified in D.02-12-074.

Standard of Conduct #7 states:

In order to exercise effective regulatory oversight of the behavior discussed above, all parties to a procurement contract must agree to give the commission and its staff reasonable access to information within seven working days, unless otherwise practical, regarding compliance with these standards.

We grant a narrow exemption to Standard of Conduct #7 for those procurement contracts entered into to satisfy the requirements of the first quarter 2003, January 1 - March 31, 2003, inclusive. This exemption also applies to Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (Edison).

II. Procedural Background

On October 24, 2002, in D.02-10-062, the Commission adopted the utilities' procurement plans filed on May 1, 2002, as modified to reflect the changes ordered in D.02-10-062, inclusion of D.02-09-053's allocation of existing California Department of Water Resources (DWR) contracts, and any procurement done under the transitional authority we granted in D.02-08-071. D.02-10-062 also adopted seven standards of conduct regarding utility procurement transactions.

We directed the utilities to file modified short-term procurement plans consistent with D.02-10-062 by November 12, 2002 and provided an opportunity for all interested parties to file written comments on the updated plans. We adopted the updated plans, with certain modifications, in D.02-12-074. Also in that decision, we modified Standards of Conduct #2, #4, and #6, and clarified Standard #7.

On December 23, 2002, SDG&E filed an "Emergency Motion for Reconsideration and Suspension of Standard of Conduct No. 7 in D.02-10-062," and requested that parties be directed to respond by December 27. In the absence of the assigned Administrative Law Judge (ALJ), the Assistant Chief ALJ granted this request by electronic ruling. PG&E and Edison timely filed comments on December 27.

III. SDG&E's Motion and Parties' Responses

SDG&E states that it recognizes the Commission's and the Legislature's directive to return the respondent utilities to full procurement on January 1, 2003, consistent with the utilities' statutory obligation to serve their customers and the provisions of Assembly Bill 1 of the First Extraordinary Session (AB1X, Stats. 2001, Ch. 4). Under the transitional procurement authority granted in

D.02-08-071, SDG&E issued its Requests for Offers (RFO) for renewable and non-renewable power in order to resume procurement in advance of January 1. In Resolution E-3803, the Commission approved the renewable resource procurement contracts SDG&E chose to enter into to cover part of its residual net short (RNS) position.

On December 11, SDG&E issued an RFO for a standard On-Peak SP 15 CAISO energy block for first quarter 2003 delivery. This RFO was issued pursuant to the interim contracting authority SDG&E received in D.02-08-071. SDG&E received responses from six sellers and selected four for its short list. The contracts were to be executed as of December 23 to ensure that delivery could commence on January 1. SDG&E claims that the language of Standard of Conduct #7 is impeding its ability to finalize agreements with these short-listed suppliers, thus supplies for this on-peak period have not been purchased. SDG&E's Vice President of Electric and Gas Procurement (Latimer Lorenz) declares under penalty of perjury that "the exclusive basis for failure to successfully conclude negotiations with at least three of the four short-listed sellers was the information access requirement that was included in the proposed agreement to give effect to Standard of Conduct No. 7." SDG&E maintains that if the Commission suspends this requirement for supply contracts of less than 12 months duration, there is a very strong probability that SDG&E will be able to conclude negotiations and ensure the necessary procurement of energy for this time period.

Edison supports SDG&E's motion and contends that it is not possible to incorporate this standard into a large number of contracts before the transfer of procurement responsibility takes place. Edison believes that this standard will have an adverse impact on utility procurement and on procurement costs.

PG&E also supports the motion and includes a verified declaration of its attorney, Lawrence Witalis. Mr. Witalis declares that he has participated in negotiations with “more than a dozen potential non-jurisdictional suppliers of electric energy” and that Standard of Conduct #7 (even as clarified in D.02-12-074) has prevented the successful execution of any such contract.

IV. Discussion

In D.02-12-074, we modified and clarified certain standards adopted in D.02-10-062. For example, we modified standard #2. We also provided a specific definition of the terms “least-cost dispatch” and “prudent contract administration,” as used in standard #4, and adopted a cap on potential disallowances. Because standard #6 was of great concern to many parties, we modified the clause for the 2003 short-term procurement plans and committed to a full discussion and review of the standard in the long-term procurement phase.

Several of the arguments the utilities raise now were before us in considering D.02-12-074. We note that PG&E stated that standard #7 would be unacceptable to many suppliers and requested that both standards #6 and #7 be deleted. California Wind Energy Association (CalWea), the Center for Energy Efficiency and Renewable Technologies (CEERT), the Independent Energy Producers (IEP), and Sempra Energy Resources (SER) also supported elimination of standard #7. These parties were concerned that this requirement may require nonjurisdictional entities to give the Commission access to broad areas of information, some of which would be potentially privileged, competitively sensitive data. The Utility Reform Network (TURN) proposed that the Commission address these concerns by clarifying that the requirement applies only to information demonstrating compliance with the approved behavior standards at the time of contract execution. We made this clarification in

D.02-12-074 and specifically recognized that “[t]he concerns of parties regarding standard #7 are based on a misunderstanding of the requirement. We do not seek unlimited discovery but rather seek only information demonstrating compliance with the approved behavior standards at the time of contract execution.” (Id., mimeo. at p. 55.) We also noted that parties raised several issues regarding the standards of conduct in pending applications for rehearing of D.02-10-062, which will be addressed in future decisions.

The Commission remains committed to retaining the regulatory oversight and jurisdiction necessary to ensure adequate and reliable utility service at just and reasonable rates. However, we recognize the utilities’ need to begin procurement almost immediately. Furthermore, we now have evidence that SDG&E and PG&E have queried the market through competitive solicitations and have found that, even with the clarification provided in D.02-12-074, these utilities have not been able to successfully execute certain contracts.

Therefore, as an interim measure for the 2003 short-term procurement plans only, we grant a narrow exemption to Standard of Conduct #7 for those procurement contracts entered into to satisfy the requirements of the first quarter 2003, January 1 - March 31, 2003, inclusive. This exemption also applies to PG&E and Edison. This is a reasonably cautious approach. Granting this narrow exemption will allow the Commission to more fully assess the applications for rehearing on the various standards of conduct,¹ but should also

¹ We note that PG&E has proposed certain approaches to resolving this dilemma, including limiting data production to information within the utility’s possession that is not confidential, or for confidential information, providing prior notice and opportunity to seek protection, or crafting a protective order that would ensure the information is not disclosed to market participants or competitors.

Footnote continued on next page

allow the utilities to obtain the necessary supplies to meet their first-quarter residual net short needs. While SDG&E provides more specific information, it is also reasonable to extend this narrow exemption to PG&E and Edison, and to treat all three utilities consistently.

V. Waiver of Comments by the Commission on Draft Decision

Pursuant to Rule 77.7(f)((9) of the Commission's Rules of Practice and Procedure, we determine that the public necessity requires waiver of the 30-day period for public review and comment. SDG&E filed its emergency motion on December 23, 2002. Parties filed responses on December 27. We must ensure that SDG&E can fully procure as of January 1, consistent with the requirements of AB1X and the expiration of the authority of DWR under AB1X to enter new contracts after December 31, 2002. Thus, failure of the Commission to act by December 30, 2002 could endanger the public's health and welfare, and this clearly outweighs the public interest in allowing a comment-and-review period.

VI. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Christine M. Walwyn is the assigned Administrative Law Judge in this proceeding.²

We note that Commission staff need not sign a nondisclosure agreement, because all Commission employees are subject to Pub. Util. Code § 583 and General Order 66-C. In fact, a non-disclosure agreement is already in place in this proceeding for non-market participants (See ALJ McKenzie's May 1, 2002 Ruling) and members of the utilities' Procurement Review Groups (See ALJ Walwyn's October 10, 2002 Ruling). It is reasonable to address these issues in our consideration of the applications for rehearing.

² In ALJ Walwyn's absence, this decision was prepared by Assistant Chief ALJ Minkin.

Findings of Fact

1. Both the Commission and the legislature have clearly expressed their intent to return the respondent utilities to full procurement on January 1, 2003, consistent with the utilities' statutory obligation to serve their customers and the provisions of Assembly Bill ABX1.

2. We now have evidence that SDG&E and PG&E have queried the market through competitive solicitations. SDG&E represents that, even with the clarification to Standard of Conduct #7 provided in D.02-12-074, it has not been able to successfully execute contracts for on-peak SP 15 energy. Similarly, PG&E represents that it has been unable to successfully execute contracts that include language to give effect to Standard of Conduct #7.

Conclusions of Law

1. It is reasonable, as an interim measure for the 2003 short-term procurement plans only, to grant a narrow exemption to Standard of Conduct #7 for those procurement contracts entered into to satisfy the requirements of the first quarter 2003, January 1 - March 31, 2003, inclusive.

2. Granting this narrow exemption will allow the Commission to more fully assess the applications for rehearing on the various standards of conduct, but should also allow the utilities to obtain the necessary supplies to meet their residual net short needs. It is also reasonable to treat the major electric energy utilities consistently and to extend this exemption to PG&E and Edison.

3. Pursuant to Rule 77.7(f)(9), we find that public necessity requires the waiver of the 30-day period for public review and comment on this draft decision. We must ensure that the utilities can adequately procure energy for first quarter 2003 and this clearly outweighs the public interest in allowing a comment-and-review period.

4. After issuance of the agenda for this meeting, SDG&E filed its emergency motion. There is a need for immediate action prior to January 1, 2003, so that the utilities can undertake procurement responsibilities, consistent with the directives of this Commission and the Legislature. Accordingly, the Commission added this item to the agenda under Government Code § 11125.3(a)(2) so that it could consider the draft decision in this matter.

5. This order should be effective today in order to allow the utilities to immediately execute contracts for procurement as of January 1, 2003.

INTERIM ORDER

IT IS ORDERED that:

1. The emergency motion of San Diego Gas & Electric Company (SDG&E), filed on December 23, 2002, is granted, as modified herein.

2. As an interim measure for the 2003 short-term procurement plans only, we grant a narrow exemption to Standard of Conduct #7 for those procurement contracts entered into to satisfy the requirements of the first quarter 2003, January 1 - March 31, 2003, inclusive.

3. This exemption applies to Pacific Gas and Electric Company, Southern California Edison Company, and SDG&E.

This order is effective today.

Dated December 30, 2002, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

CARL W. WOOD

GEOFFREY F. BROWN

MICHAEL R. PEEVEY

Commissioners